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No. 92-97

In The
Supreme Court of the United States

October Term, 1993

Northwest Airlines, Inc., Simmons Airlines, Inc., COMAIR, Inc., Midway Airlines (1987), Inc., USAir, Inc., American Airlines, Inc. and United Airlines, Inc.,

Petitioners,

v.

County of Kent, Michigan, The Kent County Board of Aeronautics and The Kent County Department of Aeronautics,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THRIFTY RENT-A-CAR SYSTEM, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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This brief is submitted in support of the position of Petitioners on the questions presented. Letters evidencing the consent of Petitioners and Respondents to the filing of this brief are filed contemporaneously herewith.

INTEREST OF AMICUS CURIAE

Thrifty Rent-A-Car System, Inc., ("Thrifty") is an Oklahoma corporation, which operates and franchises others to operate car rental businesses under, among others, the service mark "Thrifty Car Rental."[1] Thrifty and its franchisees operate approximately 150 locations in the airport-related car rental market, with approximately 30 of these being on-airport and the remainder off-airport, but near the airport. At each airport in which Thrifty and its franchisees operate on-airport, they do so under concession agreements with the airport, pursuant to which they typically pay certain rentals, along with "concession fees" based upon a percentage of their gross receipts from the rental of vehicles, typically 10% of those gross receipts. At a great number of the airports at which Thrifty and its franchisees operate off-airport, airports have imposed fees on gross receipts (typically 7% to 10%) from the rental of vehicles to airport-arriving customers as a "user fee" or "access fee" for the privilege of picking up their pre-reserved customers at the curb at the terminal. More than 75 airports charge off-airport percentage fees.[2] Charges paid by car rental companies,

[1] Since 1989, Thrifty has been a wholly-owned subsidiary of Pentaster Transportation Group, Inc., which in turn is a wholly-owned subsidiary of the Chrysler Corporation.

[2] In addition to the inequities in evidence in this case, Respondents, as is typical of airports around the country, charge courtesy vehicle operators, such as hotels and motels, which make similar use of airport facilities as Thrifty, a nominal access fee, while charging Thrifty a gross receipts fee. Respondents have recently instituted at Kent County International Airport an Off-Airport Car Rental fee of 7% of "gross airport revenue" in addition to a fee of $120 per year, per courtesy vehicle. By contrast, Corporate courtesy vehicles pay only the $120 annual fee, while Hotels/Motels, Taxis and Charter Vehicles are charged the $120 annual fee plus $.50, $.75 and $1.00 per trip, respectively. Letter from Robert A. Buchanan to Erik H. Jesson, dated April 16, 1993 ("Buchanan Letter").

which are passed through by them directly or indirectly to the airline passengers using their services, virtually always exceed the actual cost to the airport of providing the facilities and services necessary for the conduct of their businesses.

Airports justify the fees charged car rental companies by contending that the airport provides them customers by permitting them to operate in or drive up to the facilities at which the airlines land their aircraft and deliver the passengers.[3] Airports do not supply customers to car rental companies. The airport furnishes an airline traveler a place to land and conduct his business; the airline traveler chooses his own destinations and his own modes of transportation in the air and on the ground.

Airports have also invoked, as justification for imposition of excessive car rental fees, the provisions of Section 2210 of Title 49 App., U.S.C., the Airport and Airway Improvement Act ("AAIA"). In pertinent part, the AAIA requires that, in order to obtain federal grants for airport projects, an airport must "maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible. . . ." and make the airport "available for public use on fair and reasonable terms without unjust discrimination." As Petitioners explain, excessive user fees

[3] Counsel for Kent County International Airport recently explained, in a letter to counsel for the Thrifty franchisee serving that airport, the difference between the new off-airport car rental fee and that charged to other ground transportation operators, by stating that taxis, limousines and hotel courtesy vans "are not in direct competition with rental car companies." He went on to point out that the fee is intended to "cover non-signatory operators who use the facilities of the Airport to access a marketplace generated by the Airport," and described the fees Thrifty is required to pay as being "in recognition of the business derived by Thrifty from the Airport in competition with those [on-airport car rental companies] who pay a premium to be under lease on the Airport." Buchanan Letter.

are not necessary to make Respondents' airport self-sustaining. Further, other airports, like Respondents here, deny that either the non-discrimination provisions of the AAIA or the Anti-Head Tax Act, 49 U.S.C. App. § 1513 ("AHTA"), which Congress intended be viewed together with the AAIA, applies at all to such car rental fees. Both the language and history of those statutes belies the position taken by Respondents.

Failure to consider car rental fees when assessing the fairness of an airport's fee structure is a significant omission. Independent studies have estimated that the direct cost of off-airport car rental gross receipts fees to airline passengers alone will be at least $100 million per year and perhaps as much as $200 million per year. When the longer-term economic effect of these fees on the competitive environment of the airport-related car rental market is considered, the cost to airline passengers could be as high as $500 million per year or more.[4] This is in addition to the cost to airline passengers resulting from the concession fees charged on the gross receipts of on-airport operations. The "airline passenger" who is paying these costs is the very airline passenger, the "person traveling in air commerce," who is among those to whom the protection of the AHTA and the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl.3, should apply. Respondents and other airports have argued that neither Congress nor the Federal Aviation Administration ("FAA") has required them to give any consideration to either the fairness and reasonableness of ground transportation-related fees or the fairness and reasonableness of the total cost to the airline passenger, because "ground transportation" is

[4] See, e.g., *Airport Access Fees for Auto Rental Companies: A Consumer Perspective*, Consumer Federation of America, June 1988, included in the testimony of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America on Airport Gross Receipts Fees, before the Subcommittee on Economic and Commercial Law, Judiciary Committee, U.S. House of Representatives, June 28, 1990. ("CFA Report")

outside the purview of the AHTA and the AAIA. Some courts have agreed with that contention; others have not.

As amicus curiae, Thrifty offers the Court the perspective of non-aeronautical service providers at the nation's airports. Thrifty does not object to paying a reasonable fee for its use of the airport, and recognizes that this Court has never required that an "exact" measure be used to determine reasonableness of such fees, but Thrifty agrees with Petitioners in this case that the fee structure at Kent County International Airport is unfair and unreasonable, both to the airlines and to car rental service providers, and should be struck down.

SUMMARY OF ARGUMENT

In resolving the conflict between the Sixth and Seventh Circuits. Thrifty urges this Court to adopt the reasoning of the Seventh Circuit in *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). Speaking through Judge Posner, the Seventh Circuit held that the combination of concession fees and airline user fees caused the total cost on the airlines and their passengers to be unreasonable. Thrifty believes this Court can reach this result either under the Commerce Clause of the United States Constitution or by holding that the AHTA, read in conjunction with the AAIA, requires that the entire fee structure of an airport must meet the AHTA test in order for fees charged airlines to meet the AHTA test. Though it need not necessarily do so to establish the standard, Thrifty urges the Court to hold that the AHTA, read in conjunction with the AAIA, applies directly to on-airport and off-airport car rental fees, since those fees are "fees" or "other charges" on "persons traveling in air commerce."

ARGUMENT

I. FAILURE TO APPLY THE SAME STANDARDS TO CAR RENTAL FEES AS TO AIR TRAVEL FEES RESULTS IN AN OVERALL FEE STRUCTURE WHICH DOES NOT MEET EITHER THE COMMERCE CLAUSE STANDARD OR THE AHTA STANDARD

Failure of regulatory agencies and courts to apply consistent standards to the totality of the airport fee structure has resulted in imposition of fees that are irreconcilable with either the Commerce Clause or the applicable statutes.

The FAA has declined to treat any element of ground transportation as within the ambit of the AHTA. In 1984, the FAA, in response to an inquiry by the House of Representatives, took the position that rental car companies "have not, traditionally, been viewed by the FAA or the Courts as aeronautical activities. Neither have they been so significantly linked with air transportation that they have been included in the definition of air commerce." [5] More recently, the U.S. Department of Transportation [6] noted the position of the FAA by citing a February 1, 1985 letter to the Honorable Mark Andrews from former FAA Administrator Donald D. Engen. The DOT Report quotes Mr. Engen's letter as stating:

> Historically, the FAA has interpreted [Section 2210] and its parallel predecessor provisions as being directed toward aeronautical users and not being applicable to nonaeronautical users, including providers of off-airport services. Consequently, the FAA has not become involved in the review of airport operator fee arrangements with nonaeronautical airport users.
>
> . . . The FAA has concluded that [the AHTA] is limited in application to situations involving carriage by aircraft. Since non-aeronautical off-airport service providers are not engaged in carriage by aircraft they are considered outside the protection of [the AHTA] and, consequently, a gross receipts fee imposed upon them by an airport authority is not prohibited.

Quoted in DOT Report, App. B. p. 82, 84. The FAA has taken this position despite the clear language of the AHTA, which on its face applies to more than "carriage by aircraft."

In the absence of clearly-enunciated standards requiring that the fee structure of an airport be, as a whole, fair, reasonable and not unjustly discriminatory, courts have reached inconsistent results in dealing with challenges to car rental fees. For example, the Eleventh Circuit upheld against an Equal Protection challenge an off-airport fee which was *equal* in percentage to the in-terminal concession fee, stating the requirement that the fee not be a "wholly arbitrary act," *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 825 F.2d 367, 371 (11th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988) ("Alamo/Sarasota I"). Applying the "rational basis" test, the court merely required that the airport's justification for the fee be "at least debatable." Alamo/Sarasota I, at 372. There, the court found that it was reasonable to treat off-airport and on-airport car rental companies as receiving the *same* benefit, since they both accessed airport arriving passengers. *Id.*, at 373. Yet, applying the same relaxed standard, a U.S. district court in Michigan found that an on-airport concessionaire was not denied Equal Protection when it was charged 9.5% of its off-airport rental revenue (for rentals within a three-mile radius of the airport) and off-airport car rental companies were charged nothing for their access to the airport.

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[5] Federal Aviation, *Report*, 1985, p. 2, as cited in CFA Report at p. 44.

[6] "A Review of The Imposition of Gross Receipts Fees on Off-Airport Car Rental Companies," U.S. Department of Transportation, Report to the Senate Committee on Appropriations; the Senate Committee on Commerce, Science and Transportation; the House Committee on Appropriations; and the House Committee on Public Works and Transportation. April, 1989. ("DOT Report")

Budget Rent-A-Car Systems, Inc. v. County of Wayne, Michigan, 742 F.Supp. 947 (E.D. Mich. 1990), *aff'd*, 951 F.2d 348 (6th Cir. 1991). In that case, the court found that the *difference* in fees was justified by the substantial additional benefit Budget received from operating in the terminal. *Id.*, at 951. These cases are examples of the dozens of lawsuits generated by the differing interpretations in the absence of clear standards for determining and reviewing an airport's fee structure.

What the nation's airports have effectively done, and what Respondents are asking this Court to perpetuate by affirming the Sixth Circuit in this case, is to isolate the consideration of the fees imposed on various users, without ever focusing on the fairness and reasonableness of the fee structure as a whole and its effect on persons traveling in air commerce. By isolating each category of fees and applying different arguments with regard to each, excessive fees charged users have been justified without considering the impact of the fee structure as a whole on the airline passenger or on the companies on which the fees are initially imposed.

For example, the evidence in this case shows that the airlines are charged on a "cost" basis, while car rental concessions are charged on a "benefit" or "what the market will bear" basis. In each instance, however, the ultimate burden is borne by the airline passenger, resulting in a totality of fees which, when added to other sources of funding, is more than the total cost of operating and improving the airport. In addition, since the trial of this matter, Respondents have made application to institute Passenger Facilities Charges (see Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 13)[7] and have imposed off-airport access fees on car rental companies. All these charges are in addition to the 10% federal tax on airline tickets. When each of these charges is viewed in isolation from the others, it may seem superficially plausible to justify them as reasonable. When they are viewed together and when the classifications are analyzed, the fee structure is grossly unreasonable and unfair.

[7] 1990 amendments to Section 1513 permit Passenger Facility Charges of $1, $2, or $3 per enplanement, up to two enplanements per one way trip.

As noted by the Federal Trade Commission in its comments on the DOT report, the "most desirable fee structure would assess charges that allow the airport to meet its revenue needs while achieving the greatest level of overall consumer welfare," DOT Report, App. A, p. 66. If airports are not required to have a fee structure which is fair, reasonable and not unjustly discriminatory overall, then this objective cannot be achieved.

While differing over the availability of a Commerce Clause challenge, both Petitioners and Respondents correctly rely on this court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), as providing the underlying "minimum" test for airport user fees under the Constitution. In *Evansville*, this Court stated its reluctance to determine for the states the amount and method of collection for such fees, but did require that states do so under a "uniform, fair and practical standard." *Id.*, at 713. It is difficult, if not impossible, to believe that this Court intended that an airport could meet this test without consistently applying some reasonable, uniform, fair and practical standard, not only *within* certain categories of users or types of charges, but *between and among* all users and types of charges. To apply the test otherwise is to permit airports to impose charges and fees which, when added together, are an undue burden on interstate commerce.

This has certainly been the case with regard to the relationship between fees charged airlines and fees charged car rental concessionaires and off-airport car rental customers at the nation's airports where, as here, airports are charging the airlines fees based upon the actual costs of facilities they use and then including these same costs in

justifying charging car rental companies for the "benefit of the presence of the airport facility." Under this funding scheme, an airline passenger who rents a car is charged twice for the use of the airport, while an airline passenger who rides a private automobile pays only once. Whether an airport is using a residual cost financing method or a compensatory one, the same logic applies. Both the overall fee structure and each individual fee determination should be fair and reasonable.

The same rationale applies to the applicability of the AHTA to the issues in this case. As discussed more fully below, this Court should hold that the AHTA directly governs car rental concession fees and off-airport car rental fees. But even if such fees are not separately governed by the AHTA, read in conjunction with the AAIA, the Court should hold that fees charged airlines cannot meet the AHTA and AAIA requirements unless the overall fee structure, and each individual fee determination, is fair, reasonable, and not unjustly discriminatory. If the Sixth Circuit decision is upheld, many more of the nation's airports will adopt a funding structure similar to that of Respondents, one that is unfair, unreasonable and unjustly discriminatory.[8]

To establish the controlling principle of fairness and reasonableness, this Court need not set out in detail an appropriate specific fee structure or put itself in the place of local or state governments in determining one. It need only adopt the rationale that in order for the fees charged to airlines to meet either the *Evansville* test or the AHTA test, the overall fee structure, including fees on car rental concessions and off-airport car rental fees, must be fair, reasonable and non-discriminatory. To merely hold that

[8] As pointed out in Petitioners' Brief on Petition for Writ of certiorari, after this Court upheld the head taxes in *Evansville*, a large number of airports enacted head taxes. Similarly, after the 11th Circuit upheld the imposition of a 10% off-airport access fee in Alamo/Sarasota I, the number of airports imposing such fees increased sharply.

the airlines' fees should be reduced by the amount of the excess concession fees would not resolve the basic issue. The overall fairness of the fee structure and its impact on persons traveling in air commerce should govern. With this standard clearly enunciated, the considerable body of statutory and case law defining fairness, reasonableness and non-discrimination could be utilized by airports to arrive at appropriate fee structures and by courts to evaluate them.

II. CAR RENTAL CONCESSION FEES AND OFF-AIRPORT CAR RENTAL ACCESS FEES ARE A "FEE" OF "OTHER CHARGE" LEVIED DIRECTLY OR INDIRECTLY ON "PERSONS TRAVELING IN AIR COMMERCE" WITHIN THE MEANING OF 49 U.S.C. APP., § 1513

Respondents would have this Court limit the scope of the Anti-Head Tax Act, 49 U.S.C. App., § 1513, by ignoring its reference to "persons traveling in air commerce" or by so limiting the definition of "persons traveling in air commerce" as to render it of no effect. They take this position in spite of their assertions, and those of airports generally, in other contexts, that car rental companies serving the airport market are wholly dependent for their livelihood on the stream of airline passengers arriving at the airport.

In upholding off-airport gross receipts fees, various courts have, at the urging of airports who were parties to those actions, found a close nexus between the arrival of the customer by airplane and activities of the car rental company at the airport. For example, the Eleventh Circuit upheld against an equal protection challenge off-airport fees of 10%, in part because the airport had a "rational basis" for concluding that the airport would lose concession revenues if the "airport passenger" chooses to rent a car off-airport. Alamo/Sarasota I, at 373. On appeal after remand on remaining issues, the Eleventh Circuit also adopted the argument of the airport that

"Alamo is reaping the benefit of the entire airport facility because in the absence of the airport Alamo could lose a significant portion of its business," finding that "Alamo does enjoy the indirect 'use' of the entire airport facility through the travelers it services." *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority,* 906 F.2d 516, 519 (11th Cir. 1990), *cert. denied,* 498 U.S. 1120 (1991) ("Alamo/Sarasota II"). Likewise the Ninth Circuit denied a Commerce Clause challenge by Alamo to a 7% gross receipts fee levied by the Palm Springs, California, airport, noting that the fee was assessed for "using the access roads to pick up and drop off airline passengers who rent cars." *Alamo Rent-A-Car, Inc. v. City of Palm Springs,* 955 F.2d 30 (9th Cir. 1991), as Amended on Denial of Rehearing and Rehearing En Banc (1992). The court there found that the fee "approximates the indirect use to the entire facility that Alamo makes through the travelers its services." *Id.* at 31.

In each of these cases, it was effectively conceded that the fee charged exceeded the direct cost to the airport of providing the particular facilities and services directly used by the car rental companies, i.e. the roadways and curbsides.[9] The fees were upheld because of the assumed "benefit" to such companies derived from the presence of the whole airport facility. The nexus between the car rental company and the airport facility was the airline passenger.

Courts are not alone in recognizing a close relationship between the air travel portion of a passenger's trip and

[9] The CFA Report notes two studies, one at a large hub and one at a small hub, which determined actual cost per courtesy vehicle at 30 to 60 cents per round trip. By contrast, a typical one-day rental of a vehicle will cost in excess of $30 (though weekly rates in leisure markets may bring this cost down to between $15 and $20 per day). Thus, a "trip" on a courtesy vehicle where the rental is subject to a gross receipts fee of 10% would cost a customer approximately $3 for a one-day rental, $6 for a two-day rental, and so on.

the car rental portion. The Consumer Federation of America, in a series of reports, found that econometric evidence supports the conclusion that the car rental industry is closely tied to the travel industry and to airports. CFA Report, p. 5. The CFA described the manner in which airports set charges for various types of airport use as "inefficient and inequitable" and noted the legal loophole created by treating the connection between airports and off-premise businesses as close enough for gross-receipts fees to be considered nominally "rational," yet not close enough to treat customers subject to the fees as being in "air commerce" and thus covered by the AHTA. CFA Report, Executive Summary, p. 4. Noting that the FAA itself has declined to treat any element of ground transportation as within the ambit of the AHTA, the CFA went on to describe many airports as a "monopoly that has slipped past regulation because the agency which could have exerted jurisdiction chose not to." *Id.*, p. 4.

Clearly, Section 1513 prohibits direct or indirect levy of any "fee" or "other charge," not only "on the *carriage* of persons traveling in air commerce" or "on the *sale of air transportation* or on the gross receipts therefrom" but on "*persons* traveling in air commerce" (emphasis added). "Head taxes" are direct charges on such "persons" which were specifically prohibited by Section 1513 (though limited "Passenger Facility Charges" are now permitted under amendments to the statute). Logic dictates that "other fees and charges" such as landing fees, terminal rentals and other charges on airlines that are effectively passed through to passengers in ticket prices are charges on "the carriage of persons traveling in air commerce" or on the "sale of air transportation." [10]

Unless Congress intended to bring within the protection of Section 1513 other direct and indirect charges such as

[10] Reasonable charges to airlines for these items are specifically permited under the AHTA.

car rental concession fees and off-airport access fees, there was no need to include the phrase "fee . . . or other charge" in conjunction with the phrase "on persons traveling in air commerce." If the intent were merely to outlaw head taxes or fees charged to or through airlines, the other words in the section accomplish that objective. Instead, Congress included a blanket restriction on all charges on such persons, whether imposed directly or indirectly. It is a settled principle of statutory construction that a court is obliged to give effect, if possible, to every word Congress used. *See e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1977). Ordinarily, where, as here, terms are connected by a disjunctive, each should be given separate meanings, unless otherwise indicated by the context. *Id.*

Indeed, the Federal Aviation Act, 49 U.S.C. App., § 1301(23), defines "Interstate air commerce" as "the carriage by aircraft of persons . . . in [interstate] commerce . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." By this definition, Congress recognized that a passenger is not less in "air commerce" because a part of his or her journey may be completed by means other than riding an airplane. To determine otherwise is to create an analytical complexity not reasonably capable of resolution. Attempts to determine when a passenger is no longer an "airline customer" and becomes a "car rental customer" can produce almost laughable results. For instance, in a recent attempt to isolate the amount of terminal space to include in "costs" attributable to off-airport car rental businesses, a study performed for the Baton Rouge, Louisiana, airport was based in part on a survey of the users of rest rooms in the baggage claim area to determine how many such "users" were going to rent a car from an off-airport car rental company. A similar survey was not conducted outside rest rooms elsewhere in the terminal because of the assumption that up until somewhere between the gate and the baggage claim area, the customer was an "airline" customer and not a "car rental" customer.

Surely Congress intended instead to consider that a person is "traveling in air commerce" until he completes his use of the airport facility, whether (in the case of originating or transfer passengers) by enplaning or (in the case of terminating passengers) by arranging for ground transportation.

It follows that if "car rental customers who arrive on an airplane" are "persons traveling in air comerce," then Congress intended to include within the purview of Section 1513 all fees and charges assessed on such persons (either directly or through charges passed on to them by those companies who provide goods and services for them at the airport) for use of the airport facility. Exclusion from the scope of Section 1513 (and the concomitant reasonableness test in both Section 1513 and Section 2210) of fees and charges related to ground transportation, and particularly car rental, ignores the economic impact of such fees and charges on the overall cost of air travel and on the provision of travel services to persons traveling in air commerce.

In a 1989 report to Congress, the United States Department of Transportation noted that "imposition of gross receipts fees will increase the price of car rental services and decrease the supply of car rental services." DOT Report, p. 4, 44. Noting the interrelation of these fees to other airport charges, the DOT found that at ninety (90) airports described in one survey, car rental revenues constituted 24% of the landside revenues of the airports and 13% of the total revenues of the airports. *Id.*, p. 4-5. At these ninety (90) airports, 56% of the total airport revenues came from landside operations and only 44% from airside operations. Another study of thirty (30) major airports estimated off-airport car rental revenues at those airports at $670 million, thus creating the potential for collection of gross receipts fees of $67 million, which could,

in theory, be used to lower charges to other users of the airport. *Id.*, p. 5. As previously noted, the CFA estimates that the total cost to consumers of the off-airport fees alone could be as much as $500 million anually, or more. Indeed, it should be noted that on any given trip involving both air travel and car rental, depending on the city of origin and destination and the length of the car rental, low advance-reservation air fares may be lower than or approximately equal to the charges for the car rental portion of the trip. Thus, to ignore charges on airline passengers related to the car rental portion of the trip creates a substantial risk of unfairness and unreasonableness to car rental companies and their customers and in the total fee structure of the airport.

For the reasons outlined here the Court should hold that charges for car rental concession fees and off-airport car rental fees are governed by the AHTA, read in conjunction with the AAIA, and must be fair, reasonable and not unjustly discriminatory.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed on the issues presented.

Respectfully submitted,

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